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IN THE

Supreme Court of the United States

October Term, 1994

SOUTHVIEW FARM and RICHARD H. POPP,

Petitioners,

against

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE JOINT LEGISLATIVE COMMISSION ON THE DAIRY INDUSTRY, JOHN R. KUHL, CHAIRMAN AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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No. 94-1316

In The Supreme Court of the United States

OCTOBER TERM, 1994

SOUTHVIEW FARM AND RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al., Respondents*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF AMICUS CURIAE JOINT LEGISLATIVE COMMISSION ON THE DAIRY INDUSTRY - JOHN R. KUHL, CHAIRMAN

This brief is filed upon the written consent of the parties pursuant to *Supreme Court Rule* 37.2.

INTEREST OF *AMICUS CURIAE*

The New York Joint Legislative Commission on the Dairy Industry is a bipartisan and bicameral body composed of five members of the state Senate and five members of the Assembly. The Chairman, Senator John R. Kuhl, Jr., is also Chairman of the Senate Agriculture Committee. The Commission maintains a research staff of dairy industry experts and has conducted public hearings and issued research reports on dairy industry issues since it was established in 1986.

The Commission was established because the Legislature found the existence of "severe economic pressures which are affecting and which may affect the industry and dairy farmers in particular." (1986 N.Y. Laws, Chap. 50) Five other northeastern states made similar findings of emergency economic conditions for dairy farmers when the farm price of milk dropped sharply in 1991.[1]

The *amicus curiae* holds a comprehensive statutory mandate to investigate and analyze the economic, environmental, marketing and regulatory pressures affecting the dairy industry and to recommend policies designed to maintain its economic vigor. The dairy industry provides employment for 60,000 New York citizens in the production, processing and distribution

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[1]Conn. Public Acts 91-312, §45; Mass. Gen. L., Ch. 94A, §10 (Executive finding); Vermont Stat. Ann., tit. 6, Ch. 161; Maine Rev. Stat. Ann., tit. 7 §2954; N.J. Stat. Ann., §4:12A-1 (Executive finding).

components of the industry. (*id.*) Despite the steady loss of dairy farms, New York remains the third largest milk producing state in the nation. (*id.*)

SUMMARY OF ARGUMENT

1. Three business days before oral arguments in the Court of Appeals, the court accepted an *amicus curiae* brief from the U.S. Environmental Protection Agency which, for the first time, raised the issue of whether the dairy farm was a "Concentrated Animal Feeding Operation". That issue had not been briefed by either party. The Court of Appeals refused a request by Southview for time to file an answering brief. That action violated FED. R. APP. P. 29. The unanswered government brief formed the basis of the court's alternative holding that Southview Farm is a C.A.F.O. This "so far departed from the accepted and usual course of judicial proceedings .. as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(1)(a). The appropriate disposition would seem to be summary reversal pursuant to Rule 16.

2. The Court of Appeals holding that a manure spreader is a "point source" under the Clean Water Act has vast implications for all forms of animal agriculture throughout the nation. Even the U.S. Environmental Protection Agency has disapproved this holding. Manure spreaders are always used in rural terrain which is laced

with brooks, streams, gullies, drainage ditches, and ponds. All of these are "waters of the United States," within the technical meaning of that term. Accordingly, for all practical purposes, the decision below subjects manure spreaders to NPDES permit requirements, effluent limitations, and other regulation, as well as citizen initiated litigation. Virtually all dairy farms in the United States dispose of manure on crop lands and fields. There are almost 150,000 dairy farm operations in the United States. All will be affected by the "point source" holding of the Court of Appeals.

3. Run-off from the croplands and fields of dairy farms was never intended to be regulated by the Clean Water Act. The drafters of the Act intended agricultural run-off to be treated as "non-point sources," subject to a non-regulatory strategy involving research, education and management directed by the states. The language of the Act itself, and its legislative history, explicitly refer to agricultural runoff as a non-point source. When the Act was adopted in 1972, Congress was fully aware that spreading manure on fields and crops was the standard and best method of disposal.

4. The term "Concentrated Animal Feeding Operation," as used in the Clean Water Act, should be read in the light of common agricultural usage. A "feeding operation" ("feeder cattle") is a term used in distinction from a "milking operation" ("milkers"). Congress intended to regulate feedlots for beef cattle, which were then

emerging as a potentially serious source of pollution. Feedlots concentrate manure directly on the ground in confined open lots. Dairy farm operations, even very large ones, do not concentrate manure because it is collected and widely dispersed on fields where crops and forage are grown to feed the cows. E.P.A.'s original regulations correctly construed the Act as excluding agricultural operations which raised their own crops or forage. The Court of Appeals eliminated that exclusion by construing it so narrowly that the crops and forage must be raised inside the dairy barn for the exclusion to apply. This was simply a judicial repeal of the statutory and regulatory exclusion.

I.

WITH RESPECT TO THE C.A.F.O. ISSUE, THIS COURT SHOULD SUMMARILY REVERSE AND REMAND BECAUSE THE COURT OF APPEALS VIOLATED FED. R. APP. P. 29.

Three business days before oral arguments in the Court of Appeals, the court accepted an *amicus curiae* brief from the U.S. Environmental Protection Agency. The government brief argued that the dairy farm was a "Concentrated Animal Feeding Operation." That was the first time the issue was introduced in the case. (*Petition*, 12) The Court of Appeals refused Southview's motion for time to file an answering brief. (*id.*) That action violated

fundamental fairness as well as the explicit terms of Fed. R. App. P. 29. The *amicus curiae* recognizes that it is not the usual function of an *amicus* to raise procedural issues from which it has suffered no prejudice. But it is submitted that this error so prejudiced the proper functioning of the appellate process that this Court may and should take cognizance of the matter *sua sponte*. The unanswered government brief formed the basis for the court's holding that Southview Farm is a C.A.F.O. (34 F.3d at 123) Southview and the Farm Bureau, as *amicus curiae*, were the sole litigators in a position to critique the government's argument from the standpoint of agricultural realities. They were simply shut out of the adjudicative process. This directly resulted in a holding which is premised on false assumptions about basic farming practices. The refusal to hear one side of the argument "so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's power of supervision." Sup. Ct. R. 10(1)(a). The appropriate disposition would seem to be summary reversal and remand pursuant to Rule 16 with respect to the C.A.F.O. issue.

II.

THE COURT SHOULD REVIEW THE TWO CONSTRUCTIONS OF THE CLEAN WATER ACT INVOLVED IN THIS CASE BECAUSE BOTH WILL

HAVE FAR REACHING AND ONEROUS IMPACTS ON FARMERS THROUGHOUT THE NATION

The Court of Appeals held that a manure spreader is a "point source" under the Clean Water Act. (34 F.3d at 119) Even the U.S. Environmental Protection Agency has refused to support this holding. (See p. 7, *infra*.) This holding has vast implications for all forms of animal agriculture throughout the nation. Manure spreaders are always used in rural terrain. This is laced with brooks, streams, gullies, drainage ditches, and ponds. All of these are "waters of the United States," within the technical meaning of that term. *International Paper Co.* v. *Ouellette*, 479 U.S. 481, 486 (1987) ("[T]he Act applies to virtually all surface water in the country ...."); *United States* v. *Riverside Bayview Homes*, 474 U.S. 121 (1985); 40 C.F.R. §122.2 Accordingly, the decision below subjects manure spreaders to NPDES or SPDES permit requirement, effluent limitations, citizen enforcement actions, as well as government initiated civil and criminal enforcement actions.

Virtually all dairy farms in the country dispose of manure on fields and use spreading equipment. See *Methods and Practices for Controlling Water Pollution from Agricultural Nonpoint Sources*, 53 (U.S. Envir. Protection Agency, 1973) (E.P.A. 430/9-73-015) D. Bath *et al.*, *Dairy Cattle: Principles Practices, Problems, Profits*, p. 15, Table 1.10 (Lea & Febiger, Phila. 1985) There are almost 150,000 dairy farm operations in the United States. *Milk Production: February 1995*, p. 20 (U.S. Dept. of

Agriculture, National Agricultural Statistics Service) All but a few will be affected by the decision below.

The Environmental Protection Agency has issued a position paper which states:

> "In the *Southview Farm* case, the Circuit Court agreed with the citizen plaintiffs' alternative argument that, 'manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point sources under the case law.' *Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994). EPA does not endorse this interpretation and believes it was unnecessary for the Court to reach this point because Southview Farm operated a 'large' CAFO. As a large CAFO, the means of conveyance (i.e., manure spreading vehicles) was irrelevant for determining whether there was a point discharge." [*Perceptions About E.P.A.'s Actions in the Southview Farm Case*, U.S. Envir. Protection Agency, Office of Water, p. 3 (Dec. 12, 1994)] (See Appendix.)

In fact, the determination of the Court of Appeals was, as the court characterized it, an alternative holding. (34 F.3d at 119) Alternative holding stands as *stare decisis*. *Woods* v. *Interstate Realty Co.*, 337 U.S. 535, 537 (1949).

E.P.A.'s official recognition that the Court of Appeals was in error is alone a compelling reason for this Court to grant certiorari to dispel the confusion. The agency's

disavowal of the holding does not protect farmers because they are now open to citizen enforcement actions.

The CAFO holding of the Court below will impact all farms having 300 mature dairy cattle and which discharge manure "through a manmade ditch, flushing system or other similar manmade device." 40 C.F.R. §122, App. B ("and either one of the following conditions are met") Almost all farms utilize manmade drainage systems and devices. See E.P.A., *Methods and Practices for Controlling Water Pollution from Agricultural Nonpoint Sources*, p. 3-18 (1973) Accordingly, virtually all farms with 300 or more animals will become "medium size CAFO's" under E.P.A.'s rules. (See *Perceptions and Facts About the Southview Farm Decision*, p. 1.)

III.

CONGRESS NEVER INTENDED TO REGULATE AS A POINT SOURCE RUNOFF FROM FARM FIELDS AND CROPLANDS

The statutory text of the Clean Water Act, 86 Stat. 816, twice refers to runoff from agricultural land as a non-point source.

One provision, explicitly categorizes "runoff from manure disposal areas and from land used for livestock and crop production" as a nonpoint source. 33 U.S.C.

§1288(b)(2)(F)[2] Another section refers to "agricultural and silvicultural activities, including runoff from fields and crops and forest lands" as "nonpoint sources of pollutants." 33 U.S.C. §1314(f)[3] Both sections were enacted by Congress in the Federal Water Pollution Control Amendments of 1972, 86 Stat. 816, the same legislation which defined the term "point source." 86 Stat. 816, 886 The Court of Appeals overlooked both sections. The Court erroneously concentrated on the definition of "point source" in isolation from the rest of the statute. (31 F.3d

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[2]33 U.S.C. §1288(b)(2)(F) in relevant part provides: "Any plan shall include ... (F) a process to (i) identify, if appropriate, agriculturally and silviculturally related nonpoint sources of pollution, including return flows from irrigated agriculture, and their cumulative effects, runoff from manure disposal areas, and from land used for livestock and crop production, and (ii) set forth procedures and methods ... to control to the extent feasible such sources;"

[3]33 U.S.C. §1314(f) in relevant part provides:

"The Administrator ... shall issue ... information including (1) guidelines for identifying and evaluating the nature and extent of nonpoint sources of pollutants, and (2) processes, procedures, and methods to control pollution resulting from - (A) agricultural and silvicultural activities, including runoff from fields and crops and forest lands;"

114, 117-118.) *Department of Revenue of Oregon* v. *ACF Industries*, 510 U.S. ___, 114 S. Ct. 843, 849 (1994); *Gade* v. *National Solid Wastes Mg't. Assn.*, 505 U.S. ____, 112 S.Ct. 2374, 2383 (1992); *New York* v. *United States*, 505 U.S. ___, 112 S.Ct. 2408, 2425 (1992) This Court has made it clear that "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme - because the same terminology is used elsewhere in a context that makes its meaning clear ..." *United Savings Ass'n.* v. *Timbers of Inwood Forest*, Assoc., 484 U.S. 365, 371 (1988); *Massachusetts* v. *Morash*, 490 U.S. 107, 115 (1989); *Pavelic & LeFlore* v. *Marvel Entertainment*, 493 U.S. 120, 123 (1989); *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986).[4]

The legislative history of the Federal Water Pollution Control Amendments of 1972 also demonstrates Congress' clear intent to classify agricultural runoff as a nonpoint source. *Senate Report No.* 92-414 reprinted in 2 *U.S. Code Cong. & Admin. News* 3677 (1972) ("The bill also requires the Administration to conduct research into better methods of controlling pollutants from nonpoint sources

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[4]Another canon of statutory construction is also involved. This court has noted that the Clean Water Act "anticipates a partnership between the States and the Federal government, animated by a shared objective," and in such a context, preemption of the states' role should not be readily found. *New York* v. *United States*, 505 U.S. ___, 112 S. Ct. 2408, 2424 (1992).

such as agricultural runoff."); *id.*, §3705 "One of the most significant aspects of this year's hearings on the pending legislation was the information presented on the degree to which nonpoint sources contribute to water pollution. Agricultural runoff, animal wastes, soil erosion, fertilizers, pesticides and other farm chemicals are a part of runoff ..." (Emph. supplied) The extended commentary on Section 304(e)(2)(A) 33 U.S.C. §1314, is particularly significant. The Senate report notes that the section requires the Administrator of E.P.A. "to issue information to the States and to the public on the processes, procedures, and methods to control pollution related to nonpoint sources. Included within this category are activities such as agriculture." 2 *U.S. Code Cong. & Admin. News*, 3718 (1972) It is clear that Congress was very much aware that sediment from agricultural runoff "is by volume our major pollutant" and that "Fertilizer and pesticide runoff are also major agricultural nonpoint sources." (*id.*) Congress specifically chose to deal with agricultural runoff in a non-regulatory way.

The study of methods for controlling "runoff from fields and crop ... lands" was conducted as required by §304(e), 33 U.S.C. §1314(f). The Administrator of E.P.A., in consultation with the U.S. Department of Agriculture, issued the required report, entitled *Methods and Practices for Controlling Water Pollution from Agricultural Nonpoint Sources* (1973) (E.P.A. Doc. No. 430/9-73-015) This document demonstrates the Administrator's contemporaneous understanding of the 1972 legislation.

An entire chapter is devoted to the appropriate handling of animal wastes. (*id.* 53-58) The report notes that,

> "Land is a nonpoint source of pollutants to water systems, mainly by means of erosion. The application of animal wastes to land can increase pollution if proper practices are not followed. When animal wastes are properly applied to land, the practices is a highly effective and acceptable means for disposal." (*id.* 53)

The report treats as nonpoint sources "animal wastes applied to agricultural land," including "waste removed from feeding facilities" and "storm runoff and snow melt." (*id.*) There is an entire section devoted to "Wastes Removed from Animal Confinement Facilities" (*id.*, 53-54), and "Methods of Waste Application," to land. (*id.* 54) The agency was fully aware of the widespread practice of spreading manure by mechanical equipment. "The surface application methods include surface and sprinkler irrigation techniques, and tank spreaders ... The tank spreader methods require more labor than irrigation methods." (*id.*) The Report also recognizes the need for water erosion control methods (*id.* 55; 3-24), including "natural or outlets ... for safe disposal of runoff from fields" (*id.* 18), as well as the use of pipe outlets. (*id.*) All of these devices are treated as nonpoint sources.

Subsequently, Congress held extensive oversight hearings on E.P.A.'s enforcement policy with respect to feedlots, but never disturbed the policy of treating agricultural runoff as a nonpoint source. *Control of Pollution from Animal Feedlots: Hearings Before a*

Subcommittee of the Committee on Government Operation of the House of Representatives, 93rd Cong., 1st Sess. (1973); *Control of Pollution from Animal Feedlots and Reuse of Animal Wastes*, H.R. Rep. No. 93-1012, 93rd Cong., 2d. Sess. (1974) Congress' only intervention has been to narrow the definition of point source in order to exempt agricultural activities.

IV.

CONGRESS NEVER INTENDED TO TREAT CONVENTIONAL DAIRY FARMS WHICH GROW THEIR OWN FEED AND FORAGE CROPS AS CONCENTRATED ANIMAL FEEDING OPERATIONS

Before adoption of the Water Pollution Control Amendments of 1972, the Senate Subcommittee on Air and Water Pollution held a hearing exclusively addressed to feedlot operations. *Hearings Before the Subcommittee on Air and Water Pollution*, 92d Cong. 1st Sess. (1971) The testimony and appendices establish that the primary problem facing Congress was the recent development of beef feedlots - large concentrations of animals in confined open spaces. (*id.*, 2517, 2547, 2553, 2565.) Dairy farms, even large ones, concentrate animals, but not waste. The animal waste is deposited initially on the barn floor, then collected and dispersed on the land, where it is taken up and controlled by crops and vegetation. See *Methods and Practices for Controlling Water Pollution from Agricultural*

Nonpoint Sources, 53-57, (U.S. Environmental Protection Agency, 1973) The use of pasture land was not, in 1972, and is not now, the primary source of nutrition for dairy cows.[5] Pasturage cannot provide adequate nutrients for milk production in the volume necessary to sustain a dairy farm.

The "concentrated animal feeding operation" provision in 33 U.S.C. §1362(14) was addressed primarily to beef feedlots. The term "feeding operation" itself distinguishes it from a "breeding" or "dairy operation." In agriculture, "feeder" animals are animals being fattened for slaughter. The remote origins of the statutory language can be found in regulations of the Kansas Board of Health presented to the Kansas City hearing. *Hearings, supra*, p. 2561. They refer to areas "in which no vegetation, intended for animal food, is growing." (*id.*) E.P.A.'s initial understanding of the statutory term was correct. It excluded "a lot of facility" were "crops, vegetation, forage growth, or post harvest residues are not sustained ..." 40 C.F.R. §122.23(b)(ii) The House Committee on Government Operations held oversight hearings in 1973 on E.P.A.'s proposed NPDES regulations. The Committee received in evidence comments by the Secretary of Agriculture to the E.P.A. Administrator. The Secretary suggested the following definition:

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[5]See D. Bath *et al., Dairy Cattle: Principles, Practices, Problems, Profits*, 155-156 (Phila. 1985).

> "A 'Concentrated Animal Feeding Operation' is a feed lot, feed yard, or confined feeding facility having more than 300 animal units at one time. Feed lots, feed yard, or confined feeding facilities shall mean the feeding of livestock on sites or facilities from which wastes must be removed and that are not normally used for raising crops, or on which no vegetation intended for livestock feeding is growing."[6]

This expresses the original and correct understanding of the statutory term. See also definition of "feedlot" in U.S. Environmental Protection Agency, *Common Environmental Terms*, p. 9 (1974)

The 1973 E.P.A. report, *Methods and Practices for Controlling Water Pollution from Agricultural Nonpoint Sources*, also throws light on the agency's original understanding of the term "post harvest residues". That report contains the following definitions on page 73:

> "crop residue - The portion of a plant or crop left in the field after harvest.
>
> "crop residue management - Use of that portion of the plant or crop left in the field after harvest for protection or improvement of the soil."

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[6]*Hearings: Control of Pollution From Animal Feedlots*, H. Rep. Comm. on Government Operations, 93rd Cong. 1st Sess., p. 873 (1973).

The most familiar example of "post harvest residues" would be the stubble of corn stalks left on farm fields. The original Congressional and administrative intent to exclude conventional farms which grow their own feed and forage has been totally nullified by the Court of Appeals. The result of the court's construction is that crops, vegetation, forage growth or post harvest residues must be grown inside the barn or dairy cows must be raised solely on pasture with no shelter at all. This simply amounts to judicial nullification of the statutory intent and repeal of the words of the regulations.

CONCLUSION

For all the foregoing reasons the *amicus curiae* urges this Court to grant the Petition for Certiorari.

Respectfully submitted,

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March 30, 1995

APPENDIX

U.S. ENVIRONMENTAL PROTECTION AGENCY
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PERCEPTIONS AND FACTS ABOUT THE SOUTHVIEW FARM DECISION

December 12, 1994

PERCEPTION #1. All farmers may face regulatory controls for manure spreading.

REALITY: The *Southview Farm* case is about concentrated animal feeding operations, as defined by EPA regulations, not farming operations generally. Under the express terms of the Clean Water Act, concentrated animal feeding operations (CAFOs) are specifically subject to permit requirements. Other farming operations are not subject to CWA permit requirements; most feedlots are not subject to the permit requirements. This case did not change the law on this point.

Not all feedlots are CAFOs. The first threshold question is whether a feedlot is an "animal feeding operation (AFO)," i.e., a lot or facility where animals are (1) stabled/confined and fed/maintained for a total of 45 days or more in any 12-month period and (2) crops, vegetation, forage growth or post harvest residues are not sustained over any portion of the lot or facility. Not all AFOs are

CAFOs. CAFOs are AFOs that meet certain criteria based on size, manner of waste conveyance, and, in some cases, whether a representative of the permitting authority has visited the AFO personally.

Generally, only owners and operators of CAFOs may face regulatory controls for spreading of the manure produced by their facility. A CAFO exists if it is (1) a "large" AFO (with over 1000 animal units) or (2) a "medium-sized" AFO (between 300 and 999 animal units that has a "direct discharge through a manmade conveyance" to waters of the United States or through which waters of the United States pass). Finally, if the owner or operator of a CAFO does not cause an addition of manure to waters of the United States, that CAFO would not need a permit. Permits are required only to authorize the discharge of pollutants from a CAFO. Some CAFOs that do not discharge nonetheless do obtain permits as to provide a "permit shield" in the event of unanticipated, protracted storm events.

PERCEPTION #2. Permitting authority has now been extended for federal and state regulators to all aspects of manure handling, including operation of vehicles.

REALITY: Permitting authority under the Clean Water Act does not extend to operation of vehicles or any other aspect of manure handling unrelated to the "addition of pollutants from a point source to waters of the United States." Under the Clean Water Act, a CAFO is

specifically defined as a "point source" and thus discharges from such operations are subject to CWA permit regulation. Most other farming operations would not be "point sources" within the meaning of the CWA under the agricultural storm water discharge exemption. Even manure discharges from CAFOs may qualify for the agricultural storm water exemption, but that was not the case with Southview Farm.

The court in *Southview Farm* said that the issue in determining whether the exemption applies is whether discharges are the result of precipitation, and not whether discharges occur during the rainfall or mix with rain water runoff. Testimony was presented to the jury to indicate that Southview Farm spread manure in anticipation of rain to take advantage of the exemption. Though discharges occurred during rainfall events, the discharges were not the result of precipitation but rather the over-saturation of the fields with manure.

PERCEPTION #3. The definition of CAFO has now been expanded beyond EPA's historic program and regulations.

REALITY: The interpretation of the vegetation criterion is not an expansion of historic interpretations of the point source permit program for CAFOs. As the amicus brief explained, the explanation of the vegetation criterion was based on the administrative record supporting the CAFO regulations published in 1974. EPA recognizes that not all States administering approved point source permit

programs interpret the CAFO regulations in a consistent manner. The relative complexity of the CAFO regulation itself has resulted in inconsistent State reporting of sources of water quality impacts pursuant to CWA section 305(b). To remedy what EPA perceived to be inconsistent interpretations of the CAFO regulations nationwide, in 1991, EPA convened a workgroup of EPA Regions and approved States to develop a guidance manual on interpretation of the regulation. EPA met with feedlot/producer groups to seek out review and comment. Explanations of the regulations in the amicus brief are consistent with the draft guidance manual.

PERCEPTION #4. All farmers may be subject to citizen suits for discharges without a permit for runoff from fields where manure was spread.

REALITY: Only owners and operators of unpermitted concentrated animal feeding operations may be subject to citizen suits, where there are discharges from the CAFO to navigable waters, not all farmers. Moreover, only owners and operators of "large" feedlots may be subject to citizen suits for "runoff," or sheet flow from fields. "Medium-sized" feedlots will not be subject to citizen suits for "runoff" because such feedlots are not concentrated animal feeding operations unless (1) the "runoff" is to waters of the United States that pass through the area of animal confinement or (2) the feedlot discharges "directly" to waters of the United States through a manmade conveyance.

PERCEPTION #5. All manure spreaders are point sources.

REALITY: Manure spreading operations are not necessarily point sources under the Clean Water Act. As explained previously, CAFOs are the only feedlots subject to regulation under the point source permit program. If a feedlot is not a CAFO, it is not a point source. In the *Southview Farm* case, the Circuit Court agreed with the citizen plaintiffs' alternative argument that, "manure spreading vehicles themselves were point sources. The collection of liquid manure into tankers and their discharge on fields from which the manure directly flows into navigable waters are point sources under the case law." *Southview Farm*, 34 F.3d 114, 119 (2d Cir. 1994). EPA does not endorse this interpretation and believes it was unnecessary for the Court to reach this point because Southview Farm operated a "large" CAFO. As a large CAFO, the means of conveyance (i.e., manure spreading vehicles) was irrelevant for determining whether there was a point source discharge.

If Southview Farm had been a medium-sized CAFO, the means of conveyance would be relevant because a medium-sized AFO is not a CAFO unless the discharge is through a manmade conveyance or the discharge occurs directly into waters of the United States passing through the area of animal confinement. If neither of those two means of conveyance criteria were met, a medium-sized AFO would not be a CAFO unless designated by the

permitting authority after an on-site inspection. Therefore, the existence of manure spreading devices as a medium-sized AFO is relevant to determine whether it is a CAFO. For small AFOs, to be a point source, the feedlot would need to both (1) discharge through a manmade device (e.g., use manure spreaders) and (2) be designated as a CAFO by the permitting authority. Thus, extending the *Southview Farm* Court's reasoning to medium-sized and small AFOs is misplaced. The Court's "alternative" holding on this point was *dicta*. *REALITY:* All manure spreaders are not necessarily point sources. In the Southview case, the Circuit Court stated that the manure-spreading devices used on Southview property were point sources. However, in this particular case because the number of animals met the size requirement of a large CAFO (an AFO with over 1000 animal units), this point was dicta. This means that the discussion of whether the manure spreader was a point source was irrelevant in the case because Southview was determined to be a point source, a CAFO.

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PERCEPTIONS ABOUT EPA'S ACTIONS IN THE SOUTHVIEW FARM CASE

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PERCEPTION #1. EPA intends to broaden its regulatory control over farmers, as evidenced by the filing of the amicus brief in Southview Farm case.

REALITY: The United States filed the amicus brief in the *Southview Farm* case to correct the District Court's legal interpretation of existing EPA regulations. The District Court below had concluded that Southview Farm was not an AFO based on the vegetation criterion described previously. The District Court held that, because Southview Farm grew crops in fields adjacent to the feedlot, the feedlot was not an AFO. In the amicus brief, EPA explained that the Agency interpreted the vegetation criterion differently -- that only vegetation in the lot or facility where animals are stabled/confined and fed/maintained should be considered to determine whether a feedlot is an AFO. To conclude otherwise would render the definition of CAFO meaningless because it disregards "concentration" of animals. EPA presumes that most, if not all, feedlots have some vegetation nearby.

EPA did not intend to broaden regulatory controls, but merely to clarify that a "large" feedlot was, according to existing regulations, a concentrated animal feeding operation. If uncorrected, the legal position announced in the District Court below would have effectively eliminated all existing regulatory controls over operations clearly intended to be subject to CWA permitting by Congress.

In the amicus brief, EPA also attempted to explain the "agricultural storm water discharge" exemption. EPA argued that even "large" CAFOs would not be subject to the CWA point source program if, for instance, a CAFO spread manure on agricultural fields consistent with accepted agricultural practices (e.g., not at rates in excess of normal agronomic rates, not when the ground is over-saturated, etc.). EPA did argue that not all additions of pollutants from an agricultural field would be exempt, so that agricultural fields would not provide a "nonpoint haven" where any other industrial point source discharger could evade the CWA through land application of industrial wastes. The Court did not incorporate EPA's interpretation of the exemption because the Southview Farm matter did not involve such facts.

PERCEPTION #2. EPA intends to encourage citizens to sue farmers for manure spreading and offers no protection if they do sue.

REALITY: EPA has no intention of encouraging CWA citizen suits against farmers for manure spreading. EPA

recognizes that manure spreading in and of itself is a routine, accepted agricultural practice which accomplishes two beneficial goals; removal and distribution (usually upon cropland) from the animal confinement area and increased fertility of cultivated land. EPA's regulation of CAFOs under the point source (NPDES) program is concerned only with the proper collection, retention, storage, handling, and disposal of animal wastes by CAFOs, and not all farmers generally.

PERCEPTION #3. EPA regulators give no credit to farmers for the practices they adopt voluntarily.

REALITY: As explained below, the United States argued in the amicus brief that the "agricultural storm water discharge" exemption could be interpreted to exclude from the point source permitting program storm water discharges from manure spreading according to accepted agricultural practices. The Court did not accept EPA's interpretation because, as the jury found, the facts in Southview Farm did not present the opportunity to apply such an interpretation.

EPA, in partnership with USDA and Conservation Districts, has a long history of support to farmers, both in technical assistance and outreach and financial aid in grants and pass-through funding from the federal to the State and local level for development of best management practices (BMPs) and local demonstration projects in agricultural water use efficiency. Some examples include

(1) the CWA section 319 grants EPA provides to States to implement State nonpoint source management programs, which are frequently voluntary and incentive-based and (2) the Farm-A-Syst program, which encourage self-evaluation or "reality checking" for farmers in assessing the economy and efficiency of their farming practices.

In supporting these endeavors, EPA recognizes that most BMPs are a direct result of common sense on the part of the farmer, and are employed because the return on the investment of time and resources usually presents a better than "break-even" advantage. EPA has provided over 371 million dollars ($371M) to states from fiscal years 1990 through 1995 - most funding goes to agricultural activities.